

**A.L., Appellant**

**DEPARTMENT OF JUSTICE, U.S. MARSHALS  
SERVICE, Corpus Christi, TX, Employer**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

### Case Submitted on the Record

Before:

## ***JURISDICTION***

## ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish a right shoulder condition causally related to the accepted January 30, 2021 employment incident; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the June 9, 2021 decision, OWCP received additional evidence. The Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **FACTUAL HISTORY**

On February 1, 2021 appellant, then a 47-year-old criminal investigator, filed a traumatic injury claim (Form CA-1) alleging that on January 30, 2021 he sustained a right shoulder injury when effectuating a fugitive arrest while in the performance of duty. He did not stop work.

In a February 5, 2021 development letter, OWCP informed appellant that it had received no evidence in support of his claim. It advised him of the type of factual and medical evidence necessary and provided a questionnaire for completion. OWCP afforded appellant 30 days to respond. No response was received within the time allotted.

By decision dated March 15, 2021, OWCP accepted that the January 30, 2021 employment incident occurred, as alleged. However, it denied appellant's traumatic injury claim, finding that he had not submitted any medical evidence containing a medical diagnosis in connection with the accepted employment incident. Consequently, OWCP found that appellant had not met the requirements to establish an injury as defined by FECA.

OWCP thereafter received a March 18, 2021 medical report of Dr. Brian L. Patterson, a Board-certified orthopedic surgeon, who noted that appellant related a history of hearing a pop and ensuing pain in his right shoulder while making an arrest on January 30, 2021. Dr. Patterson performed a physical examination of the right shoulder and documented pain with active forward flexion and a grossly positive O'Brien's maneuver with tenderness over the anterior joint. He diagnosed pain, impingement, and bursitis in the right shoulder, and opined that appellant sustained an injury to the shoulder joint while lifting a prisoner. Dr. Patterson recommended magnetic resonance imaging (MRI) scans of the right shoulder to evaluate a possible labral tear.

In an April 8, 2021 follow-up note, Dr. Patterson indicated that appellant described subluxation of the right shoulder while lifting a prisoner on January 30, 2021. He reviewed an MRI scan with contrast completed on March 26, 2021 and found that it revealed a near circumferential tear of the labrum with an associated labral cyst. Dr. Patterson diagnosed pain, impingement, bursitis, and a sprain in the right shoulder and recommended that appellant consult with Dr. Jeffrey R. Schlimmer, a Board-certified orthopedic surgeon, for a possible arthroscopic labral repair.

On April 21, 2021 appellant requested reconsideration of the March 15, 2021 decision.

By decision dated May 12, 2021, OWCP modified the March 15, 2021 decision to find that the medical evidence of record was sufficient to establish diagnoses of right shoulder impingement, sprain, and bursitis. However, the claim remained denied because the medical evidence of record was insufficient to establish causal relationship between appellant's diagnosed conditions and the accepted January 30, 2021 employment incident.

On May 21, 2021 appellant requested reconsideration of the May 12, 2021 decision. In an attached statement of even date, he outlined Dr. Patterson's diagnoses and opinion that the injuries occurred during the performance of his duties.

By decision dated June 9, 2021, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>3</sup> has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA,<sup>4</sup> that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.<sup>5</sup> These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>6</sup>

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. The first component is that the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged. The second component is whether the employment incident caused a personal injury and can be established only by medical evidence.<sup>7</sup>

The medical evidence required to establish causal relationship between a claimed specific condition and an employment incident is rationalized medical opinion evidence.<sup>8</sup> The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and specific employment factors identified by the employee.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not met his burden of proof to establish a right shoulder condition causally related to the accepted January 30, 2021 employment incident.

In his March 18, 2021 report, Dr. Patterson noted appellant's history of injuring his right shoulder while making an arrest. In his April 8, 2021 follow-up note, he noted a history of pain

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<sup>3</sup> *Supra* note 1.

<sup>4</sup> *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>5</sup> *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>6</sup> *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

<sup>7</sup> *T.H.*, Docket No. 19-0599 (issued January 28, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>8</sup> *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

<sup>9</sup> *T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Y.S.*, Docket No. 18-0366 (issued January 22, 2020); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

and a pop with subluxation of the right shoulder while lifting a prisoner. Dr. Patterson diagnosed pain, impingement, bursitis and a sprain of the right shoulder, but did not explain a pathophysiological process of how any of appellant's work duties contributed to his right shoulder conditions.<sup>10</sup> The Board has held that a medical opinion that does not offer a medically sound and rationalized explanation by the physician of how the specific employment incident physiologically caused or aggravated the diagnosed conditions is of limited probative value.<sup>11</sup> Therefore, Dr. Patterson's reports are insufficient to establish appellant's claim.

As appellant has not submitted rationalized medical evidence to establish a right shoulder condition causally related to the accepted January 30, 2021 employment incident, the Board finds that he has not met his burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.<sup>12</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>13</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>14</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>15</sup> If the request is timely, but fails to meet at least one of the

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<sup>10</sup> *J.D.*, Docket No. 19-1953 (issued January 11, 2021); *J.C.*, Docket No. 18-1474 (issued March 20, 2019); *M.M.*, Docket No. 15-0607 (issued May 15, 2015); *M.W.*, Docket No. 14-1664 (issued December 5, 2014).

<sup>11</sup> *J.B.*, Docket No. 21-0011 (issued April 20, 2021); *A.M.*, Docket No. 19-1394 (issued February 23, 2021).

<sup>12</sup> 5 U.S.C. § 8128(a); *see T.S.*, Docket No. 20-0968 (issued August 17, 2021); *T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

<sup>13</sup> 20 C.F.R. § 10.606(b)(3); *see M.S.*, Docket No. 18-1041 (issued October 25, 2018); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>14</sup> 20 C.F.R. § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2020). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

<sup>15</sup> *Id.* at § 10.608(a); *see D.C.*, Docket No. 19-0873 (issued January 27, 2020); *M.S.*, 59 ECAB 231 (2007).

requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>16</sup>

The Board has held that the submission of evidence or argument, which does not address the particular issue involved, does not constitute a basis for reopening a case.<sup>17</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Appellant's request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, the Board finds that it did not advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to further review of the merits of his claim based on either the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

In support of his reconsideration request, appellant submitted a statement detailing Dr. Patterson's March 18 and April 8, 2021 medical reports. This evidence is irrelevant to the underlying issue of whether appellant's right shoulder conditions were causally related to his accepted employment injury. Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.<sup>18</sup> As noted above, the Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>19</sup> As appellant failed to provide relevant and pertinent new evidence, he is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).

The Board, accordingly, finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish a right shoulder condition causally related to the accepted January 30, 2021 employment incident. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>16</sup> 20 C.F.R. § 10.608(b); *see T.V.*, Docket No. 19-1504 (issued January 23, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>17</sup> *T.S.*, *supra* note 12; *A.W.*, Docket No. 21-0298 (issued August 26, 2021); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>18</sup> *Supra* note 8.

<sup>19</sup> *A.J.*, Docket No. 20-0926 (issued January 26, 2021); *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, *supra* note 17.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 12 and June 9, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 13, 2022  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board